

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

MANUEL CUETO-REYES, GEORGE MURILLO,) 2:09-CV-2299-ECR-RJJ  
5 MARTIN HERALDEZ, and CARLOS )  
ARANCIBIA, )  
6 )  
7 Plaintiffs, ) Order  
vs. )  
8 )  
9 ALL MY SONS MOVING COMPANY OF LV., )  
10 aka ALL MY SONS MOVING AND STORAGE )  
OF LAS VEGAS, INC., doing business )  
11 as ALL MY SONS MOVING AND STORAGE; )  
DOES I through X, and ROE BUSINESS )  
ENTITIES XI through XX, )  
12 Defendants. )  
13 )

14 Plaintiffs in this wage and hour class action allege violations  
15 of various state and federal laws. Now pending is Defendants'  
16 motion to dismiss (#25) Plaintiffs' first amended complaint (#19).

17 The motion is ripe, and we now rule on it.

## I. Background

20 Defendants are in the business of moving personal property.  
21 (Am. Compl. ¶ 7 (#19).) Plaintiffs are employees of Defendants,  
22 working in several capacities, including driver, mover, and laborer.  
23 (Id. ¶¶ 1-4.) Plaintiffs claim that Defendants violated state and  
24 federal wage and hour laws in various respects, including failure to  
25 pay wages for time worked (id. ¶¶ 10-13, 17), failure to pay  
26 mandatory overtime (id. ¶¶ 14-15), and requiring drivers to obtain  
27 commercial driver's licences at their own expense (id. ¶ 18).  
28 Plaintiffs seek to bring their claims on their own behalf and on

1 behalf of a class of similarly situated individuals employed by  
2 Defendants during the period between January 1, 2005, and the  
3 present. (Id. ¶ 24.)

4 Plaintiffs filed their complaint in Nevada state court on  
5 November 5, 2009. On December 4, 2009, Defendants removed the  
6 action to federal court, invoking our federal question jurisdiction.  
7 (Petition for Removal (#1).) On March 25, 2010, we issued a minute  
8 order (#17) denying Plaintiffs' motion to remand (#10).

9 On December 11, 2009, Defendants filed a motion to dismiss (#5)  
10 the original complaint, and a motion to strike (#6) aimed at  
11 Plaintiffs' class claims under the Fair Labor Standards Act  
12 ("FLSA"), 29 U.S.C. §§ 201-219. On April 5, 2010, we granted  
13 Defendants' motion to dismiss (#5) and granted in part and denied in  
14 part Defendants' motion to strike class claims (#6). Plaintiffs  
15 were given twenty one days to file an amended complaint.

16 Plaintiffs filed a first amended complaint (#19) on April 26,  
17 2010. All of Plaintiffs' substantive claims are jumbled together  
18 under Plaintiffs' "First Cause of Action," entitled "State and  
19 Federal Wage and Hour Violations." (Am. Compl. ¶¶ 39-44.)  
20 Plaintiffs claim Defendants have violated Nev. Rev. Stat. §§  
21 608.016, 608.020, 608.140, and FLSA § 207. (Id. ¶¶ 39-42.)

22 Defendants filed a motion to dismiss (#25) Plaintiffs' first  
23 amended complaint (#19), Plaintiffs opposed (#26), and Defendants  
24 replied (#27).

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## II. Motion to Dismiss Standard

2 A motion to dismiss under Federal Rule of Civil Procedure  
3 12(b) (6) will only be granted if the complaint fails to "state a  
4 claim to relief that is plausible on its face." Bell Atl. Corp. v.  
5 Twombly, 550 U.S. 544, 570 (2007); see also Ashcroft v. Iqbal, 129  
6 S. Ct. 1937, 1953 (2009) (clarifying that Twombly applies to  
7 pleadings in "all civil actions"). On a motion to dismiss, "we  
8 presum[e] that general allegations embrace those specific facts that  
9 are necessary to support the claim." Lujan v. Defenders of  
10 Wildlife, 504 U.S. 555, 561 (1992) (quoting Lujan v. Nat'l Wildlife  
11 Fed'n, 497 U.S. 871, 889 (1990)) (alteration in original); see also  
12 Erickson v. Pardus, 551 U.S. 89, 93 (2007) (noting that "[s]pecific  
13 facts are not necessary; the statement need only give the defendant  
14 fair notice of what the . . . claim is and the grounds upon which it  
15 rests.") (internal quotation marks omitted). Moreover, "[a]ll  
16 allegations of material fact in the complaint are taken as true and  
17 construed in the light most favorable to the non-moving party." In  
18 re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996)  
19 (citation omitted).

20       Although courts generally assume the facts alleged are true,  
21 courts do not "assume the truth of legal conclusions merely because  
22 they are cast in the form of factual allegations." W. Mining  
23 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,  
24 "[c]onclusory allegations and unwarranted inferences are  
25 insufficient to defeat a motion to dismiss." In re Stac Elecs., 89  
26 F.3d at 1403 (citation omitted).

1       Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is  
2 normally limited to the complaint itself. See Lee v. City of L.A.,  
3 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on  
4 materials outside the pleadings in making its ruling, it must treat  
5 the motion to dismiss as one for summary judgment and give the non-  
6 moving party an opportunity to respond. FED. R. CIV. P. 12(d);  
7 see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "A  
8 court may, however, consider certain materials – documents attached  
9 to the complaint, documents incorporated by reference in the  
10 complaint, or matters of judicial notice – without converting the  
11 motion to dismiss into a motion for summary judgment." Ritchie, 342  
12 F.3d at 908.

13       If documents are physically attached to the complaint, then a  
14 court may consider them if their "authenticity is not contested" and  
15 "the plaintiff's complaint necessarily relies on them." Lee, 250  
16 F.3d at 688 (citation, internal quotations, and ellipsis omitted).  
17 A court may also treat certain documents as incorporated by  
18 reference into the plaintiff's complaint if the complaint "refers  
19 extensively to the document or the document forms the basis of the  
20 plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if  
21 adjudicative facts or matters of public record meet the requirements  
22 of Fed. R. Evid. 201, a court may judicially notice them in deciding  
23 a motion to dismiss. Id. at 909; see FED. R. EVID. 201(b) ("A  
24 judicially noticed fact must be one not subject to reasonable  
25 dispute in that it is either (1) generally known within the  
26 territorial jurisdiction of the trial court or (2) capable of

1 accurate and ready determination by resort to sources whose accuracy  
2 cannot reasonably be questioned.").

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4 **III. Analysis**

5 Defendants' motion to dismiss (#25) seeks dismissal of each of  
6 Plaintiffs' claims under Nev. Rev. Stat. §§ 608.016, 608.140, and  
7 608.020. Defendants also request that we strike Plaintiffs' demand  
8 for punitive damages.

9 **A. Claim Regarding Unpaid Wages Under Nevada Law**

10 Plaintiffs allege that Defendants violated Nev. Rev. Stat. §  
11 608.016 by "failing and refusing to pay to the Plaintiffs herein the  
12 honest and true wages for each and every hour that they have been  
13 employed and worked for the Defendants." (Am. Compl. ¶ 39. (#19).)  
14 Defendants challenge this claim by asserting that Plaintiffs are  
15 attempting to circumvent our prior holding that Plaintiffs have no  
16 private right of action for overtime and meal and rest periods.  
17 (Mot. to Dismiss Pls' First Am. Compl. at 10. (#25).) We decided in  
18 our April 5, 2010 Order (#18) that there is no private right of  
19 action to bring suit for violations of Nev. Rev. Stat. § 608.019 and  
20 § 608.018 for failure to provide meal and rest periods and to pay  
21 overtime wages. (Order at 5, 7 (#18).) The dismissal of those  
22 claims, however, does not require dismissal of Plaintiffs' claim for  
23 unpaid wages in the amended complaint. The Supreme Court of Nevada  
24 distinguishes actions to recoup unpaid wages, for which suits may be  
25 brought in court, from claims arising under different provisions of  
26 the Nev. Rev. Stat. for which there are no private causes of action.

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1 Baldonado v. Wynn Las Vegas, LLC, 194 P.3d 96, 105 n.33 (Nev. 2008).

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3 As we noted in our previous order, in Nevada, "the Legislature  
4 has entrusted the labor laws' enforcement to the Labor Commissioner,  
5 unless otherwise specified." Id. at 102. Actions to recoup unpaid  
6 wages fall under the "otherwise specified" exception. See id. at  
7 105 n.33. Nev. Rev. Stat. § 608.140 provides that:

8 Whenever a[n] . . . employee shall have cause to bring  
9 suit for wages earned and due according to the terms of  
10 his or her employment, and shall establish by decision of  
11 the court or verdict of the jury that the amount for  
12 which he or she has brought suit is justly due, . . . ,  
13 the court before which the case shall be tried shall  
14 allow to the plaintiff a reasonable attorney fee, in  
15 addition to the amount found due for wages and penalties,  
16 to be taxed as costs of suit.

17 Section 608.140 expressly recognizes civil enforcement acts to  
18 recoup unpaid wages. While Defendants argue that Plaintiffs are  
19 attempting to characterize the same factual allegations that were  
20 the basis of their dismissed claims for meal and rest periods and  
21 overtime pay as unpaid wages, Plaintiffs' claims that they were,  
22 *inter alia*, required to work before and after their work day without  
23 pay and required to work during meal and rest breaks without pay are  
24 sufficient to state a cause of action for unpaid wages under Nevada  
25 law. See Baldonado, 194 P.3d at 105 n.33. Thus, Plaintiffs' claim  
26 for unpaid wages under Nev. Rev. Stat. § 608.016 survives.

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B. Claims Under Nev. Rev. Stat. §§ 608.020, 608.140

2 Plaintiffs also seem to assert claims for violations of Nev.  
3 Rev. Stat. § 608.020 and § 608.140. The confusion lies in the  
4 manner in which Plaintiffs' complaint is composed. All of  
5 Plaintiffs' substantive claims are jumbled together under  
6 Plaintiffs' "First Cause of Action." Defendants attack the claims  
7 under Nev. Rev. Stat. § 608.020 and § 608.140 on the basis that  
8 there is no private right of action for alleged violations of those  
9 sections. Indeed, the very language of Nev. Rev. Stat. § 608.140  
10 does not lend itself to violations by the Defendants. Nev. Rev.  
11 Stat. § 608.140 provides that when an employee brings suit for  
12 unpaid wages, the court "shall allow to the plaintiff a reasonable  
13 attorney fee." Plaintiffs concede this point, arguing that  
14 "Plaintiffs have properly pleaded attorney's fees in their First  
15 Amended Complaint, in the Prayer for Relief, and not as an  
16 independent cause of action." (Pls' Opp. at 3 (#26).)

17 We would like to note that the confusion is entirely of  
18 Plaintiffs' making. Plaintiffs allege that the language in their  
19 first amended complaint, that "[t]he Defendants have and continue to  
20 violate 608.140 . . ." by no means provides for a separate cause of  
21 action. (Id.) However, by including all their claims under Nevada  
22 law and federal law in their first cause of action, Plaintiffs'  
23 allegation that Defendants violated Nev. Rev. Stat. § 608.140  
24 appears to be another claim or cause of action. We suggest that  
25 Plaintiffs organize future complaints in a more easily readable  
26 manner by separating claims into different sections, rather than  
27 jumbling all claims under one section, when they intend that some of

1 those claims should be causes of action and others merely factual  
2 bases for Plaintiffs' prayers.

3 Plaintiffs also concede that their claim that Defendants  
4 violated Nev. Rev. Stat. § 608.020 "provides a factual basis for the  
5 prayer and is not alleged as a separate cause of action." (Id. at  
6 4.)

7 Therefore, we conclude that to the extent that Plaintiffs'  
8 amended complaint (#19) can be read to assert claims under Nev. Rev.  
9 Stat. §§ 608.140 and 608.020, those claims shall be dismissed.

10 C. Plaintiffs' Request for Punitive Damages

11 Defendants request that we strike Plaintiffs' request for punitive  
12 damages if we dismiss Plaintiffs' claims under Nevada law. Since  
13 Plaintiffs' claim for unpaid wages under Nev. Rev. Stat. § 608.016  
14 survives, we deny Defendants' request to strike Plaintiffs' request for  
15 punitive damages.

16 D. Claims Under the FLSA

17 Plaintiffs also assert claims based on alleged violations of  
18 FLSA § 207(a)(1) & (2) for failure to pay overtime wages and failure  
19 to pay wages for meal and rest breaks during which Plaintiffs were  
20 forced to work. We dismissed Plaintiffs' similar claims in our  
21 previous order because the claims, as pleaded, were insufficient.  
22 Defendants do not request that we dismiss Plaintiffs' claims under  
23 the FLSA as pleaded in the amended complaint. Therefore, the claims  
24 under the FLSA survive.

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#### IV. Conclusion

2 Nevada law distinguishes between actions to recoup unpaid  
3 wages and actions seeking damages for overtime pay or failure  
4 to provide meal or rest periods. Actions to recoup unpaid  
5 wages are expressly allowed, and thus, Plaintiffs' claim under  
6 Nev. Rev. Stat. § 608.016 to recoup unpaid wages survives.  
7 Since Plaintiffs' claim under Nevada state law for unpaid  
8 wages survives, we deny Defendants' request to strike  
9 Plaintiffs' request for punitive damages. Plaintiffs' claims  
10 under Nev. Rev. Stat. §§ 608.140 and 608.020 shall be  
11 dismissed on the basis that Plaintiffs concede those claims  
12 were never meant to be causes of action, merely factual bases  
13 for claimed damages. Defendants do not request that we  
14 dismiss Plaintiffs' claims under the FLSA.

16        **IT IS, THEREFORE, HEREBY ORDERED** that Defendants' motion  
17 to dismiss (#25) is **GRANTED IN PART AND DENIED IN PART** on the  
18 following basis: Plaintiffs' claim under Nev. Rev. Stat. §  
19 608.016 survives, Plaintiffs' claims under Nev. Rev. Stat. §§  
20 608.140 and 608.020 shall be dismissed. Plaintiffs' request  
21 for punitive damages survives.

23 DATED: November 10, 2010.

Edward C. Reed.  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE